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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL DIVERSITY, and SIERRA CLUB, non-profit corporations,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF CONSERVATION, DIVISION OF OIL, GAS, AND GEOTHERMAL RESOURCES; and DOES 1 through 20, inclusive,

Defendants.

AERA ENERGY LLC, BERRY PETROLEUM COMPANY LLC, CALIFORNIA RESOURCES CORPORATION, CHEVRON U.S.A. INC., FREEPORT-MCMORAN OIL & GAS LLC, LINN ENERGY HOLDINGS LLC, and MACPHERSON OIL COMPANY,

Defendants-in-Intervention.

Case No. RG15769302

Assigned for all purposes to the Hon. George C. Hernandez, Dept. 17

NOTICE OF DEMURRER AND DEMURRER BY AERA ENERGY LLC, BERRY PETROLEUM COMPANY LLC, CALIFORNIA RESOURCES CORPORATION, CHEVRON U.S.A. INC., FREEPORT-MCMORAN OIL & GAS LLC, LINN ENERGY HOLDINGS LLC, AND MACPHERSON OIL COMPANY TO CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Declaration and Request for Judicial Notice, filed concurrently; Proposed Order, lodged concurrently*]

Date: September 30, 2015
Time: 2:30 p.m.
Dept.: 17
Reservation No.: R-1658816

Action Filed: May 7, 2015
Trial Date: None set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 30, 2015, at 2:30 p.m., or as soon thereafter as counsel can be heard, in Department 17 of the above-mentioned Court, located at 1221 Oak Street, Oakland, California 94612, Defendants-in-Intervention, Aera Energy LLC, Berry Petroleum Company LLC, California Resources Corporation, Chevron U.S.A. Inc., Freeport-McMoRan Oil & Gas LLC, LINN Energy Holdings LLC, and Macpherson Oil Company will and hereby do demur to the Complaint for Declaratory Relief and Verified Petition for Writ of Mandate filed by Plaintiffs Center for Biological Diversity and Sierra Club, pursuant to section 430.10, subdivision (e), of the California Code of Civil Procedure, on the grounds that the Complaint fails to state a cause of action as to either of its Causes of Action.

The Demurrer is based upon this Notice, the accompanying Demurrer to Plaintiffs' Complaint, the attached Memorandum of Points and Authorities, all pleadings, records, and files herein, those matters of which the Court may take judicial notice, and such oral argument as the Court may permit.

Respectfully submitted,

Dated: August 19, 2015

GIBSON, DUNN & CRUTCHER, LLP

By: _____
Jeffrey D. Dintzer

Attorneys for Defendants-in-Intervention, AERA ENERGY LLC, BERRY PETROLEUM COMPANY LLC, CALIFORNIA RESOURCES CORPORATION, CHEVRON U.S.A. INC., FREEPORT MCMORAN OIL & GAS LLC, LINN ENERGY HOLDINGS LLC, and MACPHERSON OIL COMPANY

DEMURRER TO COMPLAINT AND VERIFIED PETITION FOR WRIT OF MANDATE

Pursuant to California Code of Civil Procedure section 430.10, Defendants-in-Intervention, Aera Energy LLC, Berry Petroleum Company LLC, California Resources Corporation, Chevron U.S.A. Inc., Freeport-McMoRan Oil & Gas LLC, LINN Energy Holdings LLC, and Macpherson Oil Company (collectively, "Energy Companies") hereby generally demur to the First Cause of Action and Second Cause of Action in the Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate ("Complaint"), filed on May 7, 2015, by Plaintiffs Center for Biological Diversity and Sierra Club (collectively, "Plaintiffs") on the following grounds:

FIRST CAUSE OF ACTION (Declaratory Relief – California Administrative Procedure Act)

The First Cause of Action fails to allege facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Plaintiffs have not alleged, and cannot allege, a valid claim for relief for failure to follow the California Administrative Procedure Act. Plaintiffs' cause of action is preempted by federal law because the relief sought would cause state law to enter a regulatory field fully occupied by the federal government and obstruct the methods chosen by the U.S. Environmental Protection Agency ("EPA") to realize the objectives of federal law pursuant to Safe Drinking Water Act ("SDWA"), which vests exclusive authority in the EPA to engage in oversight of the California Underground Injection Control ("UIC") program and enforce the program's compliance with the SDWA.

SECOND CAUSE OF ACTION (Writ of Mandate)

The Second Cause of Action fails to allege facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Plaintiffs have not alleged, and cannot allege, a valid claim for issuance of a Writ of Mandate. Plaintiffs' cause of action, which would eviscerate the Aquifer Exemption Compliance Schedule Regulations approved by EPA, would cause state law to intrude upon a regulatory field fully occupied by the federal government and wholly obstruct the way chosen by the EPA to realize the objectives of the SDWA, which grants exclusive authority to the EPA to engage in oversight of the California UIC program and enforce the program's compliance with the SDWA.

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For the foregoing reasons, the Energy Companies respectfully request that the Court sustain this Demurrer as to the First Cause of Action and the Second Cause of Action in the Complaint without leave to amend, and order that the Complaint be dismissed with prejudice.

Respectfully submitted,

Dated: August 19, 2015

GIBSON, DUNN & CRUTCHER, LLP

By: _____
Jeffrey D. Dintzer

Attorneys for Defendants-in-Intervention, AERA ENERGY LLC, BERRY PETROLEUM COMPANY LLC, CALIFORNIA RESOURCES CORPORATION, CHEVRON U.S.A. INC., FREEPORT MCMORAN OIL & GAS LLC, LINN ENERGY HOLDINGS LLC, and MACPHERSON OIL COMPANY

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I. INTRODUCTION

Plaintiffs have requested that this Court issue relief that is preempted by federal law. The Safe Drinking Water Act ("SDWA") vests in the U.S. Environmental Protection Agency ("EPA") the exclusive authority to engage in oversight of state Underground Injection Control ("UIC") programs and enforce compliance of such programs with the SDWA. Congress clearly intended the EPA to oversee state UIC programs and ensure compliance with the SDWA. Instead of deferring to the supreme authority of federal law, Plaintiffs are attempting to use state law to short-circuit implementation of the SDWA and its accompanying regulations. The relief requested by Plaintiffs, which would nullify the Aquifer Exemption Compliance Schedule Regulations expressly approved by the EPA and force DOGGR to undertake unprecedented UIC program revisions, is thus preempted by federal law.

Plaintiffs' claims are preempted by the SDWA in two primary ways. First, Plaintiffs are asking this Court to enter an order that would intrude on a regulatory field —oversight of the California UIC program and enforcement of the SDWA—fully occupied by the EPA. Congress provided the EPA exclusive authority to approve state UIC programs for primary enforcement responsibility under the SDWA. It similarly empowered the EPA to oversee administration of state UIC programs and enforce any violations of the SDWA during a state's administration of the program. Plaintiffs' attempt to inject state law into this federal scheme is preempted. Second, Plaintiffs' requested relief would function as an unacceptable obstacle to realization of the full purposes of the SDWA. The EPA has chosen a method to ensure compliance of the California UIC program with the SDWA. Any obstruction by state law to that chosen method, such as Plaintiffs' requested relief, is preempted.

II. STATEMENT OF FACTS AND LAW

In California, Class II underground injection wells are regulated by DOGGR pursuant to a Memorandum of Agreement ("primacy agreement") between DOGGR and the EPA. Under the primacy agreement, DOGGR is tasked with ensuring that underground sources of drinking water are protected in accordance with the federal SDWA. (See Code Fed. Regs., tit. 40, § 147.250.) EPA, on the other hand, is required "to regulate state underground injection control programs" to ensure compliance with the SDWA. (*Natural Res. Def. Council v. EPA* (1st Cir. 1987) 824 F.2d 1258, 1269.)

The EPA's oversight and enforcement authority was qualified by Congress "to accommodate existing state programs and avoid disrupting oil and gas production." (*Ibid.*) The EPA may not "interfere with or impede" the production or recovery of oil and natural gas, "unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." (42 U.S.C. § 300h, subd. (b)(2).) Indeed, in enacting the SDWA, Congress "contemplated regulation, not prohibition, because of the importance of avoiding needless interference with energy production and other commercial uses." (*W. Neb. Res. Council v. U.S. E.P.A.*, 943 F.2d 867, 870 (8th Cir. 1991). The EPA is exclusively empowered by Congress to manage UIC programs where the state has acquired primacy in a way that does not cause unnecessary damage to a state's vital industries.

There are two ways for a state to acquire primacy under the SDWA. First, section 1422, subdivision (b) "requires a state to show that its UIC program satisfies applicable federal regulations promulgated by EPA under 42 U.S.C. § 300h and set forth in 40 C.F.R. Part 145." (*Legal Enviro. Assistance Fd'n v. EPA* (11th Cir. 2001) 276 F.3d 1253, 1257.) Second, section 1425 "requires a state to demonstrate that its UIC program meets the requirements of SDWA §§ 1421(b)(1)(A)-(D), and represents an effective program to prevent underground injection which endangers drinking water sources." (*Ibid.*) Section 1425, which only applies to UIC programs regulating the injection of produced fluids and enhanced oil recovery, establishes requirements that "are more flexible than the requirements" under section 1422, subdivision (b). (*Ibid.*)

DOGGR was granted primacy to administer the California UIC Program pursuant to SDWA section 1425. (Code Fed. Regs., tit. 40, § 147.250) In lieu of the detailed regulations promulgated by EPA governing state UIC programs approved under section 1422, the EPA's approval of DOGGR's primacy in administering the state UIC Program under section 1425 incorporates by reference three distinct sets of requirements. First, the California Public Resources Code sections 3000 to 3359; second, the California Code of Regulations (then known as the California Administrative Code) title 14, sections 1710 to 1724.10; and third, the primacy agreement. (*Ibid.*) The primacy agreement, in particular, "establishes the responsibilities of and the procedures to be used by" DOGGR and the EPA in administration of the California UIC program. (Primacy Agreement ("P.A.") at p. 1.)

The primacy agreement clarifies that nothing in the agreement "shall be construed to alter any

requirements of SDWA or to restrict EPA's authority to fulfill its oversight and enforcement responsibilities under SDWA . . . ." (*Ibid.*) The primacy agreement affirms that it "shall remain in effect unless EPA determines that [DOGGR's] 1425 demonstration is no longer valid." (*Ibid.*) Such a determination by EPA invalidating California's primacy in administering the State's UIC Program "shall be made in accordance with Section 1425(c)" of the SDWA. (*Ibid.*) To fulfill its oversight and enforcement responsibilities, EPA has established procedures for revising state UIC programs or withdrawing primacy. (Code Fed. Regs., tit. 40, §§ 145.32–145.33.) California thus has "primary enforcement responsibility . . . until such time as the [EPA] determines, by rule" that California can no longer make the demonstration required by section 1425. (42 U.S.C. § 300h-4, subd. (c).)

Since 1983, when DOGGR acquired primacy over the California UIC program, DOGGR has been approving certain Class II underground injection projects based on the understanding that the boundaries for aquifers exempt by the EPA were adjusted in accordance with the productive limits of the field and were revised based on updated geologic information. (Declaration of N. Johnson In Support of Demurrer ("Johnson Decl."), Ex. C [3/2/15 CalEPA Memo.] at p. 4; see also 42 U.S.C. § 300h, subd. (b)(3)(A) (requiring that EPA regulations "shall permit or provide for consideration of varying geologic, hydrological, or historical conditions . . . in different areas within a State").) Moreover, while an initial version of the primacy agreement did not list 11 aquifers as exempt, a subsequently signed version of the primacy agreement, which was memorialized in the Federal Register and has been the basis for DOGGR's regulation of Class II injection wells since 1983, exempted the 11 aquifers. (Johnson Decl., Ex. C at pp. 2–3; Code Fed. Regs., tit. 40, § 147.250.)

Recently, the EPA has raised questions regarding DOGGR's administration of the state UIC program. (Johnson Decl., Ex. C at pp. 2–3.) Pursuant to its oversight and enforcement responsibilities under the SDWA and the primacy agreement, the EPA conducted an audit of the California UIC Program in 2011, along with a preliminary review "focused on aquifer exemptions" in 2012. (Johnson Decl., Ex. A [7/17/14 EPA Ltr.] at p. 1.) The EPA review of the California UIC Program "raised questions about the alignment of Class II injection wells with approved aquifer exemption boundaries." (*Ibid.*) To address these questions, the EPA "exercis[ed] [its] authority under 40 C.F.R. § 145.32" on July 17, 2014, by requesting that DOGGR conduct a drinking water source evaluation, document

aquifer exemptions, and review Class II wells in tiers. (*Id.* at pp. 1–3.) The EPA also required DOGGR to provide a status report on DOGGR's "action plan [to] address[] the identified deficiencies, including clarification of the regulatory definition of underground sources of drinking water and improved procedures for well testing and aquifer analysis." (*Id.* at p. 3.)

Following several meetings and sustained dialogue, DOGGR answered the EPA's request in a letter dated February 6, 2015. (Johnson Decl., Ex. B [2/6/15 DOGGR Ltr.].) DOGGR has undertaken a review process to determine UIC projects that have previously been permitted in (a) the 11 aquifers that have been historically treated as exempt by DOGGR according to one version of the primacy agreement, and (b) aquifers within flexible boundary zones that are known to be geologic extensions of the oil fields as they were known and mapped in 1983. (*Id.* at p. 3.) DOGGR last updated the EPA on the review process on July 31, 2015. (Johnson Decl., Ex. G [7/15/15 DOGGR Ltr.].) In the vast majority of project and permit approvals reviewed thus far, the injection is occurring in oil-bearing reservoirs where no potentially viable sources of drinking water exist. (Johnson Decl., Ex. E [DOGGR Comment Response] at p. 2.) In fact, DOGGR has yet to identify a single instance where injection activities have caused contamination of drinking water. (Johnson Decl., Ex. E [4/2/15 Press Release].)

Additionally, DOGGR proposed to "initiate rulemaking to establish a regulatory-compliance schedule to eliminate Class II injection into undisputedly non-exempt aquifers statewide." (Johnson Decl., Ex. B [2/6/15 DOGGR Ltr.] at p. 6.) This rulemaking became reality when DOGGR promulgated its emergency Aquifer Exemption Compliance Schedule Regulations on April 1, 2015. (Johnson Decl., Ex. E [4/2/15 Press Release].) The regulations were the culmination of extensive negotiations and an agreement between the EPA, DOGGR, and the State Water Board to allow the EPA and State Water Board an opportunity to review "non-endangerment" determinations made by DOGGR since acquiring primacy. (*Ibid.*; Johnson Decl., Ex. B [2/6/15 DOGGR Ltr.].) The EPA has stated the regulations are "a critical step in the State's plan to return the California Class II UIC program to compliance with the" SDWA. (Johnson Decl., Ex. F [5/28/2015 EPA Ltr.] at p. 1.)

Plaintiffs are asking this Court to entirely upend a carefully constructed compliance schedule by intruding on a domain of law exclusively committed to the EPA. Instead of deferring to the supreme authority of the EPA to engage in oversight of the California UIC program and ensure the program's

compliance with the SDWA, Plaintiffs have asked this Court to interfere with the process by "declaring that the Aquifer Exemption Compliance Schedule Regulations are void," enjoining "DOGGR to vacate and rescind the Aquifer Exemption Compliance Schedule Regulations ," and "ordering DOGGR to take all actions necessary and available to it to immediately meet its non-discretionary duties to prohibit illegal injection of wastewater into protected aquifers." (Complaint at p. 16, ¶ 3–4, 7.) Plaintiffs' requests are preempted by the clear intent of the SDWA, its implementing regulations, and the California UIC program primacy agreement. The SDWA vests the authority to initiate revisions to state UIC programs solely in the EPA. Any order of this Court revising DOGGR's administration of the UIC program would thus run afoul of basic preemption principles.

III. ARGUMENT

A. State Laws Are Preempted By Federal Law When Federal Law Occupies The Regulatory Field Or State Law Conflicts With Federal Law.

The Supremacy Clause of the U.S. Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution, or Laws of any State to the Contrary notwithstanding." (U.S. Const., Art. VI, cl. 2.) Pursuant to the Supremacy Clause, "federal law can preempt and displace state law through: (1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption." (*Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1135) The "ultimate task" in any preemption analysis "is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." (*Gade v. Nat'l Solid Wastes Mgmt. Assn.* (1992) 505 U.S. 88, 98.)

Even "[a]bsent explicit preemptive text, we may still infer preemption based on field or conflict preemption, both of which require us to imply Congress' intent from the statute's structure and purpose." (*Ting*, *supra*, 319 F.3d at pp. 1135–36.) When federal law does not directly answer the question of preemption at issue, "we look to 'the goals and policies of the Act in determining whether it in fact preempts an action." (*Ibid.* at p. 1136, quoting *Int'l Paper Co. v. Ouellette* (1987) 479 U.S. 481, 493.) Regardless of the type of preemption at issue, "the purpose of Congress is the ultimate touchstone." (*Cipollone v. Ligget Grp., Inc.* (1992) 505 U.S. 504, 516.)

Field preemption occurs "when federal law so thoroughly occupies a legislative field 'as to

make reasonable the inference that Congress left no room for the States to supplement it." (*Montalvo v. Spirit Airlines* (9th Cir. 2007) 508 F.3d 464, 470, quoting *Cipollone*, *supra*, 505 U.S. at p. 516.) Field preemption "also will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." (*Hillsborough Cnty. v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 713.)

Conflict preemption arises when "there is an 'actual conflict' between federal and state law." (*Ting*, *supra*, 39 F.3d at p. 1136.) An "actual conflict" is found where "compliance with both federal and state regulations is a physical impossibility" (*Fla. Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142–43), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67.)

B. Federal Law Exclusively Empowers the EPA To Oversee the UIC Program and Enforce Program Compliance with the SDWA.

The federal law governing state UIC program oversight and enforcement responsibilities under the SDWA is appropriately determined by the SDWA itself, as well as the implementing regulations and related determinations made by the EPA. The U.S. Supreme Court has "repeatedly held that state laws can be pre-empted by federal regulations as well as by federal statutes." (*Hillsborough Cnty.*, *supra*, 471 U.S. at p. 713.) Indeed, "[f]ederal regulations have no less pre-emptive effect than federal statutes." (*Fidelity Fed'l Savings & Loan Assn. v. De la Cuesta* (1982) 458 U.S. 141, 153.) Further, "where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on congressional authorization to displace state law.'" (*City of New York v. FCC* (1988) 486 U.S. 57, 64, quoting *Fidelity Fed'l Savings & Loan Assn.*, *supra*, 458 U.S. at p. 154.)

The SDWA and accompanying regulations promulgated by the EPA vest the EPA with exclusive authority to oversee state UIC programs and enforce those programs' compliance with the SDWA. The EPA approved DOGGR's primacy of the California UIC Program pursuant to section 1425 of the SDWA. (Code Fed. Regs., tit. 40, § 147.250) Section 1425, subdivision (c) of the SDWA makes clear that the EPA—not DOGGR or the California state courts—is empowered to determine whether California should retain primary enforcement authority. The SDWA further dictates that if the

EPA determines that the state should not retain primary enforcement authority, the EPA shall "prescribe (and may from time to time revise) a program applicable to such State." (42 U.S.C. § 300h-1, subd. (c).) The EPA has also established procedures for revising state UIC programs or withdrawing primacy, none of which describe an oversight or enforcement role for DOGGR or California state courts. (Code Fed. Regs., tit. 40, §§ 145.32–145.33.).

The federal regulations specifically governing the California UIC Program confirm this view of the SDWA. The California UIC Program is administered according to three sets of requirements incorporated by reference into the EPA's approval of DOGGR's application for primacy: California Public Resources Code sections 3000 to 3359; California Code of Regulations (then known as the California Administrative Code) title 14, sections 1710 to 1724.10; and the primacy agreement. (Code Fed. Regs., tit. 40, § 147.250) Neither the Public Resources Code nor the Code of Regulations position DOGGR or the California state courts in an oversight or enforcement role in the UIC Program. Instead, as expressly affirmed by the primacy agreement, the EPA is tasked with "oversight and enforcement responsibilities under SDWA . . . ." (P.A. at p. 1.) California is allowed to retain primacy of the UIC Program "unless EPA determines that [DOGGR's] 1425 demonstration is no longer valid." (*Ibid.*) The primacy agreement closes the loop on oversight and enforcement of the program by requiring that any determination by the EPA "shall be made in accordance with Section 1425(c)" of the SDWA. (*Ibid.*)

C. Plaintiffs' Requested Relief Is Preempted Because It Interferes With A Regulatory Field Occupied By Federal Law.

Congress intended the EPA to have sole authority to oversee administration of the UIC Program and ensure the program's compliance with the SDWA. Federal law thus occupies the regulatory field of UIC program oversight and enforcement, and preempts any state law intruding on that field.

The "key question" for any field preemption analysis is "at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted under the Act." (*Gade*, *supra*, 505 U.S. at p. 107.) Such an analysis requires a careful blending of dual, complementary perspectives on the state law at issue to accurately assess interference with the regulatory field. "In assessing the impact of a state law on the federal scheme, we have refused to

rely solely on the legislature's professed purpose and have looked as well to the effects of the law." (*Id.* at p. 105.) Even though "part of the pre-empted field is defined by reference to the purpose of the state law in question . . . another part of the field is defined by the state law's actual effect." (*English v. General Elec. Co.* (1990) 496 U.S. 72, 84.)

Further, while the SDWA itself is the primary indicator of field preemption, the Court may "also look to the pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent." (*Montalvo*, *supra*, 508 F.3d at p. 470.) Congress entrusted the EPA "with the task of promulgating regulations to carry out the purposes of [the SDWA], [and] as part of the preemption analysis we must consider whether the regulations evidence a desire to occupy a field completely." (*R.J. Reynolds Tobacco Co. v. Durham Cnty.* (1986) 479 U.S. 130, 149, citation omitted.) Significantly, the preemptive force of regulations occupying a field "does not depend on express Congressional authorization to displace state law." (*Montalvo*, *supra*, 508 F.3d at p. 470, citing *R.J. Reynolds Tobacco Co.*, *supra*, 479 U.S. at p. 149.) Rather, when the EPA "promulgates pervasive regulations pursuant to [their] Congressional authority, we may infer a preemptive intent unless it appears from the underlying statute or its legislative history that Congress would not have sanctioned the preemption." (*Ibid.*)

The SDWA and its implementing regulations make clear Congress' intent to preempt any state law that intrudes upon the EPA's authority to oversee and enforce state UIC programs. In general, the SDWA establishes a comprehensive national scheme of drinking water regulation that leaves little room for supplementary state activity. With limited exceptions, the SDWA applies "to each public water system in each State." (42 U.S.C. § 300g.) Courts have had "little hesitation in concluding that Congress occupied the field of public drinking water regulation with its enactment of the SDWA." (*Mattoon v. City of Pittsfield* (1st Cir. 1992) 980 F.2d 1, 4.) Indeed, "[t]he purpose of the [SDWA] is to assure that water supply systems serving the public meet minimum *national standards* for protection of public health." (*City of Evansville, Inc. v. Ky. Liquid Recycling* (7th Cir. 1979) 604 F.2d 1008, 1016 n.25, quoting H.R. Rep. No. 93-1185 (emphasis added).)

More specifically, Congress clearly intended the EPA to completely occupy the regulatory field of overseeing state UIC programs and ensuring the various programs' compliance with the

SDWA. DOGGR's primary enforcement responsibility for the state UIC program is governed by SDWA section 1425. Section 1425, subdivision (c) states DOGGR shall retain primacy "until such time as the [EPA] determines, by rule, that such determination is no longer valid." If the EPA determines that DOGGR should not retain primary enforcement authority, the EPA shall "prescribe (and may from time to time revise) a program applicable to such State." (42 U.S.C. § 300h-1, subd. (c).) The EPA has promulgated regulations for revising state UIC programs or withdrawing primacy, none of which describe an oversight or enforcement role for DOGGR or California state courts. (Code Fed. Regs., tit. 40, §§ 145.32–145.33.). Only the EPA "shall approve or disapprove program revisions based on the requirements of this part" and the SDWA. (*Id.* § 145.32.)

Plaintiffs have asked this Court to employ California state law to nullify and enjoin the Aquifer Exemption Compliance Schedule Regulations approved by the EPA and to expansively "order[] DOGGR to take all actions necessary and available to it to immediately meet its non-discretionary duties to prohibit illegal injection of wastewater into protected aquifers." (Complaint at p. 16, ¶ 7.) If the Court were to issue such an order, state law would interfere with a regulatory field fully occupied by federal law. The "professed purpose" of the Plaintiffs' order is obviously to upend the regulatory scheme established by DOGGR pursuant to the EPA's regulatory direction and thus federal law. (*Gade*, *supra*, 505 U.S. at p. 105.) Further, the "actual effect" of the Plaintiffs' requested order would be to entirely eliminate the EPA's authority to oversee the California UIC program and ensure its compliance with the SDWA. (*English v. General Elec. Co.* (1990) 496 U.S. 72, 84.) The SDWA and accompanying regulations "evidence a desire to occupy a field completely"—namely, the regulatory field of state UIC program oversight and SDWA compliance enforcement. (*R.J. Reynolds Tobacco Co. v. Durham Cnty.* (1986) 479 U.S. 130, 149, citation omitted.) No matter what the Court orders pursuant to Plaintiffs' request, the decision would be preempted.

Any other result would be absurd and contrary to the purpose of the SDWA, especially related to the approval of state UIC programs. Before granting primary enforcement authority to a state regulator, the SDWA requires the state to prove to the EPA that the UIC program will meet the requirements of the SDWA. Even though the SDWA allows a state to retain primary enforcement

authority of the UIC program in the state, the SDWA requires the EPA to engage in oversight of the state program and enforce the program's compliance with the SDWA. Without the EPA's oversight and enforcement responsibilities, the state would be the sole arbiter of whether its UIC program adheres to SDWA requirements. Any violation of the SDWA could continue into perpetuity because the actor violating the SDWA—the state regulatory body administering the UIC program—is the only actor also capable of ensuring compliance with the SDWA. Such a counterintuitive outcome is contrary to the purpose of the SDWA, which carves out an essential enforcement role for the EPA even after approval of a state UIC program.

Moreover, it does not appear "from the underlying statute or its legislative history that Congress would not have sanctioned the preemption." (*Montalvo, supra*, 508 F.3d at p. 470, citing *R.J. Reynolds Tobacco Co., supra*, 479 U.S. at p. 149.) The SDWA does contain a "savings clause," which provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief." (42 U.S.C. § 300j-8, subd. (e).) But this clause does not save Plaintiffs' claims from preemption. Much like the nearly identical savings clause in the Clean Water Act, the SDWA "merely says that 'nothing *in this section*,' *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act." (*Ouellette, supra*, 479 U.S. at p. 493; see also *Cal. ex rel. Sacramento Metro. Air Quality v. United States* (2000) 215 F.3d 1005, 1013 n.8 ["[O]ur research indicates that only one other statute, the Safe Drinking Water Act, includes language that is similar to that used in § 7604(d)," *i.e.*, the Clean Water Act savings clause.].) Instead of relying on the SDWA's limited savings clause, courts "must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on" potentially disruptive state laws. (*Ouellette, supra*, 479 U.S. at p. 493.)

Much like the state law at issue in *Oullette*, where a state affected by neighboring water pollution attempted to impose discharge standards different than those under the Clean Water Act, "the inevitable result" of the relief requested by Plaintiffs "would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" (*Ibid.*) It is simply beyond belief

that Congress "intended to undermine this carefully drawn statute through a general savings clause." (*Id.* at p. 494; see also *id.* at p. 497 ["It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure."].) Even though the citizen-suit provisions of the SDWA may not preempt Plaintiffs' claims, other parts of the SDWA do. The general SDWA savings clause simply does not permit Plaintiffs to bring a state court action attempting to usurp the oversight and enforcement authority of the EPA related to state UIC programs that is clearly delineated in the SDWA. Any order pursuant to Plaintiffs' Complaint will undoubtedly interfere with a regulatory field exclusively reserved for the EPA and is thus preempted.

D. Plaintiffs' Requested Relief Is Preempted Because It Conflicts With Federal Law.

Plaintiffs' requested relief would pose an undeniable conflict with federal law and is preempted. Conflict preemption arises in two ways. First, a conflict is found where it would be "a physical impossibility" to comply with both federal law and state law. (*Fla. Lime & Avocado Growers, Inc.*, *supra*, 373 U.S. at pp. 142–43) Second, a conflict is found where the state law would be "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Hines*, *supra*, 312 U.S. at p. 67.) The conflict between the federal law empowering the EPA to oversee state UIC programs and the Plaintiffs' proposed order manifests itself in both ways.

The relief requested by Plaintiffs would make it impossible for DOGGR to comply with federal law as administered by the EPA and state law as enforced by this Court. An order "requiring DOGGR to vacate and rescind the Aquifer Exemption Compliance Schedule Regulations," (Complaint at p. 16, ¶ 4), would directly contradict the EPA's admonition that the regulations are "a critical step in the State's plan to return the California Class II UIC program to compliance with the" SDWA. (Johnson Decl., Ex. F [5/28/2015 EPA Letter] at p. 1.) Contrary to Plaintiffs' unsubstantiated assertions, the SDWA is not a blanket prohibition on underground injection activities absent permission to inject in exempt aquifers. Rather, the SDWA dictates that the EPA may not establish rules for state UIC programs that "interfere with or impede" the production or recovery of oil and natural gas. (42 U.S.C. § 300h, subd. (b)(2).) It would be impossible for DOGGR to comply with the EPA's regulatory requirements, which are the culmination of several years of intensive negotiation, if DOGGR were ordered by this Court to

immediately abandon the EPA's recommended regulations. The EPA has determined that certain injections may continue pursuant to the compliance schedule established by DOGGR, and Plaintiffs' attempt to prohibit such injections should be preempted. (See *Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 95 [holding that a state law was preempted because the state law prohibited practices that were lawful under federal law].)

Plaintiffs' requested relief would also obstruct the "accomplishment and execution of the full purposes and objectives of Congress. (*Hines*, *supra*, 312 U.S. at p. 67.) Under this type of conflict preemption, "an aberrant or hostile state rule is preempted to the extent it actually interferes with the 'methods by which the federal statute was designed to reach [its] goal.'" (*Ting*, *supra*, 319 F.3d at pp. 1138, quoting *Ouellette*, *supra*, 479 U.S. at 494.) To decide whether the state law interferes with federal law, courts should "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526.) Obstruction preemption thus "focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law's text, application, history, and interpretation." (*Ting*, *supra*, 319 F.3d at pp. 1138.)

The "text, application, history, and interpretation" of the SDWA make clear that the relief requested by Plaintiffs would unacceptably obstruct the objective of the SDWA and the method chosen "to effectuate that objective." (*Ibid.*) The SDWA authorizes the EPA to protect underground sources of drinking water by approving state UIC programs that allow the state primary enforcement responsibility. To ensure compliance with the SDWA, the statute empowers the EPA to conduct oversight and enforcement of state UIC programs. (See 42 U.S.C. § 300h-4, subd. (c).) In so doing, the EPA may not establish rules for state UIC programs that "interfere with or impede" the production or recovery of oil and natural gas. (42 U.S.C. § 300h, subd. (b)(2).) When Congress enacted the SDWA, it "contemplated regulation, not prohibition, because of the importance of avoiding needless interference with energy production and other commercial uses." (*W. Neb. Res. Council v. U.S. E.P.A.*, 943 F.2d 867, 870 (8th Cir. 1991).

The EPA acted pursuant to its exclusive statutory authority on July 17, 2014, to address questions raised about the integrity of the California UIC program. (Johnson Decl., Ex. A [7/17/14

EPA Letter] at p. 1.) The EPA expressly "exercis[ed] [its] authority under 40 C.F.R. § 145.32" by requesting that DOGGR conduct a drinking water source evaluation, document aquifer exemptions, review Class II wells in tiers, and correct regulatory deficiencies. (*Id.* at pp. 1–3.) The EPA later confirmed the Aquifer Exemption Compliance Schedule Regulations are "a critical step" to ensuring the California UIC program's compliance with the SDWA. (Johnson Decl., Ex. F at p. 1.)

The relief requested by Plaintiffs would eviscerate "the method chosen" by the EPA to realize the full purpose of the SDWA. (*Ting*, *supra*, 319 F.3d at pp. 1138; see also *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Company* (D.R.I. 1995) 878 F.Supp.2d 349 (hereafter *Narragansett*), rev'd on other grounds by *Narragansett Indian Tribe v. Narragansett Elec. Co.* 89 F.3d 908 (1st Cir. 1996) [holding that lands at issue did not constitute Indian lands].) The federal district court decision in *Narragansett* is instructive. In *Narragansett*, the court addressed the question of whether Rhode Island's administration of its state UIC program on alleged Indian lands was preempted by the SDWA. (*Narragansett*, *supra*, 878 F.Supp.2d at p. 362.) The court noted that the SDWA authorized the EPA to treat Indian tribes as states and that "the SDWA regulations state that underground injection control programs for Indian lands in Rhode Island is administered by the EPA." (*Ibid.*) Because the state's administration of the UIC program would conflict with the SDWA and the EPA's regulations, the court held that the state's jurisdiction to enforce the SDWA on such lands was preempted. (*Ibid.*) As in *Narragansett*, Plaintiffs' attempt to use state law to ensure SDWA compliance of the California UIC program would conflict with the EPA's administration of the statute. The federal regulations authorize the EPA to oversee state UIC programs and ensure program compliance with the SDWA. Plaintiffs' appeal to the Court runs contrary to the explicit direction of federal law.

No matter the competing interests at stake, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." (*Free v. Bland* (1962) 369 U.S. 663, 666.) The SDWA does not authorize the use of state law to completely prohibit underground injection activities when questions arise about DOGGR's administration of the state UIC program. Rather, the SDWA authorizes the EPA to oversee the administration of the California UIC program and ensure compliance by requiring revisions to the program by DOGGR as necessary. The effect of Plaintiffs' requested relief

would be complete obstruction of the "'methods by which the federal statute was designed to reach [its] goal.'" (*Ting*, *supra*, 319 F.3d at pp. 1138, quoting *Ouellette*, *supra*, 479 U.S. at 494.) Such obstructive relief is preempted by federal law.

IV. CONCLUSION

For the foregoing reasons, the Energy Companies respectfully request that the Court grant its demurrer without leave to amend and that the Court dismiss Plaintiffs' Complaint and Verified Writ of Mandate with prejudice.

Respectfully submitted,

Dated: August 19, 2015

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